No. 03-7434

In The
Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE LAWYERS COMMITTEE FOR HUMAN RIGHTS,* HUMAN RIGHTS WATCH, AND AMNESTY INTERNATIONAL USA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Since 1978, the Lawyers Committee for Human Rights (now known as Human Rights First) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity, and respect for the rule of law. It has worked to promote U.S. compliance with international refugee and human rights law, and to help refugees gain political asylum through a pro bono legal representation program, which currently represents more than 1000 clients from 88 countries. Since September 11, 2001, Human Rights First has also worked to promote greater understanding of and respect for national and international human rights laws in U.S. national security policy. Human Rights First believes this case presents an issue at the heart of its work to ensure that the United States observes core international human rights protections in all of these areas.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear

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[1] This brief is filed with the written consent of the parties. Letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

upon offending governments and others and thus bring pressure on them to end abusive practices.

Amnesty International USA, established in 1966, is the U.S. arm of Amnesty International, a worldwide grassroots movement that promotes and defends human rights. Amnesty International USA's mission is to act in concert with the international human rights movement to prevent and end grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks the Court to decide whether Congress has authorized the Executive Branch to subject inadmissible aliens[2] to indefinite detention without a meaningful opportunity for independent judicial review. The answer to this question must be "no." All individuals have the right to be free from arbitrary detention under well-established standards of international human rights law. Respondents' reading of § 1231(a)(6) would attribute absolute authority to the Executive Branch to deprive aliens of this fundamental right. This Court rejected Respondents' reading in *Zadvydas v. Davis*, 533 U.S. 678 (2001), concluding that 8

[2] Aliens are "inadmissible" if they are ineligible for an official "lawful entry . . . into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(13)(A) (defining "admission" and "admitted"); *see also* 8 U.S.C. § 1182(a) (defining classes of aliens ineligible for admission).

U.S.C. § 1231(a)(6) must be read to comply with constitutional guarantees of due process. In light of unambiguous international law prohibiting the kind of indefinite detention Respondents say the statute permits, the Court should reach the same conclusion here.

Section 1231(a)(6) must be interpreted and applied in compliance with international law, as "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (quoting *The Schooner Charming Betsy* and labeling the principle a "canon of statutory construction"). This principle applies particularly strongly to statutory constructions that would render a statute a violation of international human rights laws. Congress should always be assumed to have intended respect for the essential rights shared by all human beings.

International law unequivocally prohibits arbitrary detention. This prohibition, which has long been recognized by the United States, is embodied in numerous international and regional human rights instruments – including instruments to which the United States is bound – and in the municipal laws of the democratic nations of the world. The prohibition affords protections to all people, regardless of their nationality or immigration status. It forbids states to detain persons unnecessarily or for unnecessarily long periods, regardless of whether the detention is carried out pursuant to municipal law. A state seeking to infringe an individual's liberty bears the burden of showing a reasonable necessity for doing so and must provide the detainee with a meaningful opportunity for independent judicial review. Thus, although a sovereign

state may expel unwelcome aliens from its territory and may detain aliens when detention is a reasonably necessary step toward expelling them, it may not detain them unnecessarily or without affording them adequate procedural protections.

Section 1231(a)(6), if read to authorize indefinite detention of inadmissible aliens, would violate the international prohibition on arbitrary detention. Under such a reading, the provision would permit the permanent deprivation of liberty even in cases in which no substantial justification exists. The limited opportunity for review of detention orders under § 1231(a)(6) is inadequate to support indefinite detention under the applicable standards.

Zadvydas recognized the existence of this prohibition in the U.S. Constitution, and there is no reason to restrict this Court's holding in *Zadvydas* to deportable,[3] as opposed to inadmissible, aliens. To the contrary, under international law, all individuals are endowed with human rights irrespective of their immigration status. The practical impossibility of repatriation does not diminish an alien's right to be free from arbitrary detention. Neither does the fiction that an alien paroled into the United States by the government has never entered the territory of the United States. If detention of a person is not reasonably necessary to accomplish a legitimate purpose, it is arbitrary and therefore impermissible under international law.

[3] Aliens are "deportable" if they have been officially admitted into, and are present in, the United States, and there is a statutory ground for removing them. *See* 8 U.S.C. § 1227(a) (defining classes of deportable aliens).

Amici therefore ask the Court to reverse the Court of Appeals and to hold that the reasonableness limitation to the Attorney General's[4] authority under § 1231(a)(6), as established in *Zadvydas* with regard to deportable aliens, applies to inadmissible aliens as well.

ARGUMENT

I. Statutes Must Be Construed to Comply With International Law and Internationally Accepted Human Right Standards

The statute in question in this case empowers the Executive Branch to detain a deportable or inadmissible alien who is ordered removed "beyond the removal period." 8 U.S.C. § 1231(a)(6). The exercise of this power is constrained by the U.S. Constitution. *Zadvydas*, 533 U.S. at 721. It is also constrained by the basic human rights protections contained in international law.

This Court has long admonished that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118. This rule of construction not only helps ensure that U.S. laws are interpreted and applied with "a decent respect to the opinions of mankind," Declaration of Independence ¶ 1, it

[4] The Homeland Security Act of 2002 transferred the functions of the former Immigration and Naturalization Service from the Department of Justice to the Department of Homeland Security. Homeland Security Act of 2002, Pub.L. No. 107-296, § 451, 116 Stat. 2135, 2195 (2002) (codified at 6 U.S.C. § 271 (Supp. 2003)). Section 1231(a)(6) has yet to be amended and still refers to the Attorney General.

is also required by international commitments that bind the United States. U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby."); *Edye v. Robertson*, 112 U.S. 580, 598–99 (1884) (recognizing that a ratified treaty is the "law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."). Indeed, as this Court recognized long ago, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Beyond even this, however, due attention to the "opinion of the impartial world" has often been urged by former and present members of this Court. In his dissenting opinion in *Zadvydas*, Justice Kennedy, joined by the Chief Justice, cited international standards regarding the detention of refugees and asylum seekers in the form of a Report of the United Nations Working Group on Arbitrary Detention and the Guidelines of the United Nations High Commissioner for Refugees to support the proposition that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." 533 U.S. at 721 (Kennedy, J., dissenting). Justice Kennedy's attention to international custom and practice follows in a long tradition of American jurisprudence. As James Madison wrote in *The Federalist* No. 63:

> An attention to the judgment of other nations is important to every government . . . [because] in doubtful cases, particularly where the national councils may be warped by some strong passion, the presumed or known opinion of the impartial world may be the best guide that can be followed. . . . [H]ow many errors and follies would [America] have avoided, if the justice and propriety of her measures had in every instance been previously tried by the light in which they would probably appear to the unbiased part of mankind?

The Federalist No. 63, at 318 (James Madison) (G. Wills ed., 1982).

Accordingly, when the right of the United States to exclude foreigners came before the Court in 1893, the Court relied on international law and practice to support this sovereign prerogative. *Fong Yue Ting v. United States*, 149 U.S. 698, 707–11 (1893). Likewise, the *Miranda* decision, which has come to symbolize the core of U.S. protections of the rights of the accused, considered law enforcement experiences in England, Scotland, and India in interpreting the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. 436, 488–90, 521–22 (1966). Justice Blackmun also later emphasized that "'evolving standards of decency' should be measured, in part, against international norms." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 45–46 (1994).

More recently, this Court has recognized the importance of looking to the "opinions of mankind" in addressing numerous problems that have come before it. Justice O'Connor has noted that "conclusions reached by other countries and by the international community should at

times constitute persuasive authority in American courts."[6] And Chief Justice Rehnquist has similarly observed that "it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."[7] Looking to the views and experiences of other countries is an essential – and expanding – part of this Court's jurisprudence. Justice O'Connor has described this development:

> As the American model of judicial review of legislation spreads further around the globe, I think that we Supreme Court Justices will find ourselves looking more frequently to the decisions of other constitutional courts, especially other common-law courts that have struggled with the same basic constitutional questions that we have: equal protection, due process, the Rule of Law in constitutional democracies. Some, like the South African court, are relative newcomers on the scene but already have entrenched themselves as guarantors of civil rights. All of these courts have something to teach us about the civilizing function of constitutional law.

Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 234 (2003).[7]

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[5] Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

[6] William H. Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), *reprinted in Germany and its Basic Law: Past, Present and Future* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

[7] Other recent opinions that have canvassed international law and the conclusions of other countries include *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (Ginsburg, J., concurring); *Atkins v. Virginia*, 536

(Continued on following page)

The relevance of international and comparative law flows from our common experiences and our collective humanity, which the Founding Fathers invoked in creating this country. The Declaration of Independence rested on the fundamental assumption that all individuals possess certain natural rights prior to the formation of government, and that government is legitimate only to the extent that it protects those rights. Individuals enjoy natural rights by virtue of membership in the human family, not by virtue of belonging to a particular political society. As Professor David Martin has observed, "we usually assume, for good reasons brought home to us by the Court's attempt to hold otherwise in 1857 [in the *Dred Scott* decision], that mere membership in the human species, combined with physical presence, is enough to call our constitutional protections fully into play."[8] Thus, as the Inter-American Commission of Human Rights emphasized with respect to the American Declaration of the Rights and Duties of Man:

> [T]he American Declaration, as a modern human rights instrument, must be interpreted and applied in such a way as to protect the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other States for which the instrument constitutes a source of international

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U.S. 340, 347 n.21 (2002); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16, 785–87 (1997).).

[8] David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 176–77 (1983).

> obligation. This basic precept in turn is based upon the fundamental premise that human rights protections are derived from the attributes of a person's personality and by virtue of the fact that he or she is a human being, and not because he or she is the citizen of a particular State.[9]

Amici respectfully submit that both international standards and international law to which the United States is bound are critical in understanding the liberty interest of removable and inadmissible aliens, and in determining what procedural review of detention is adequate to protect this freedom. Adequate review procedures are necessary to satisfy both the due process guarantees of the U.S. Constitution, and international rules and norms prohibiting the arbitrary detention of any individual. But adequate review procedures, while necessary, are not sufficient to assuage concerns that "detention that is indefinite and potentially permanent" may violate both the U.S. Constitution; *Zadvydas*, 533 U.S. at 696, and applicable international law standards, as set forth below.

II. The Indefinite Detention of Aliens Without Meaningful Judicial Review Is Incompatible With International Law and Internationally Accepted Human Rights Standards

International law unequivocally prohibits arbitrary detention, including detention that is unnecessary or that continues for an unnecessarily long time. The international

[9] Report of the Inter-American Commission of Human Rights, Case 9903, Inter-Am. C.H.R., Report No. 51/01 (Apr. 4, 2001), ¶ 178, *available at* http://www.cidh.org/annualrep/2000eng/chapteriii/merits/usa9903. htm.

prohibition on arbitrary detention also requires states to provide procedural safeguards adequate to permit those unjustly detained to secure their release. Section 1231(a)(6), if read to empower the Attorney General to hold immigrants indefinitely, would violate this international prohibition. Moreover, the "entry fiction" – the legal fiction that an inadmissible alien, who in this case was paroled into the United States by the government, has never entered the territory of the United States – provides no basis for concluding otherwise. Particularly in the absence of clear statutory language requiring indefinite detention, the Court should interpret § 1231(a)(6) consistent with its international obligations.

A. International Law Prohibits Arbitrary Detention

No misuse of government power is more clearly established as a violation of international law than the practice of prolonged arbitrary detention. The right not to be unjustly detained, so central to our concept of ordered liberty, is articulated in the earliest documents on personal liberty as well as in the declarations, covenants, treaties, and constitutions that embody modern international law and the laws of free states. Indeed, the right is universally recognized among the democratic nations and among the international bodies that represent the nations of the world.

The Magna Carta, drafted in 1215 in response to abuses of power by the English monarchy, declared that "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we

not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." Blackstone commented that this provision alone merited the title the Great Charter. William Blackstone, IV *Commentaries on the Laws of England* 424 (photo. reprint 1978) (1783). The United States adopted and affirmed the same principle in the Due Process Clause of the Fifth Amendment and did so again with the ratification of the Fourteenth Amendment. *See* U.S. Const. amend. V & XIV.[10]

Modern sources of international law are unanimous in prohibiting arbitrary detention. The most widely respected elaboration of human rights norms of the twentieth century, the Universal Declaration of Human Rights, states plainly that "[n]o one shall be subjected to arbitrary arrest, detention or exile." G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); *see* Jordan Paust, *International Law as Law of the United States* 246 (1996).

The Universal Declaration's travaux préparatoires – its drafting history – make clear that the Declaration's use of the term "arbitrary" refers not only to detentions that are unauthorized by law, but also to detentions that are in accordance with laws that are themselves unjust. *See* 3 U.N. GAOR, Pt. I, Third Comm. 247, 248 (1948) (delegate from the United Kingdom noting that "[t]here might be certain countries where arbitrary arrest was permitted" and that the "object of the article was to show that the

[10] Edward Coke equated the phrase "due process of the law" as it appeared in an English statute of 1354 with the phrase "Law of the Land" in the Magna Carta. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring) (citing Edward Coke, 2 *Institutes* 50 (5th ed. 1797)).

United Nations disapproved of such practices"). The drafters had only recently witnessed the atrocities perpetrated "legally" by Nazi Germany. They thus took care to explain that an unjust detention was not permissible simply because it was authorized by the law of the detaining state. *See generally* Parvez Hassan, *The Word "Arbitrary" As Used in the Universal Declaration of Human Rights*, 10 Harv. Int'l L.J. 225 (1969).

The Universal Declaration's condemnation of arbitrary detention was later codified in the International Covenant on Civil and Political Rights (the "Covenant"). G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.[11] Article 9 of the Covenant sets out the various requirements to ensure against arbitrary detention. Article 9(1) generally provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such ground and in accordance with such procedure as are established by law."

As in the Universal Declaration, the word "arbitrary" in the Covenant extends beyond acts unauthorized by state law. The United Nations Human Rights Committee, whose role it is to monitor compliance with the Covenant, observed that "[t]he drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more

[11] The General Assembly of the United Nations adopted the Covenant in 1966, and it entered into force in 1976. As of November 2003 there were 151 parties to the Covenant, including the United States, which ratified it in 1992.

broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law." *Womah Mukong v. Cameroon*, Communication No. 458/1991 (Aug. 10, 1994), U.N. Doc. CCPR/C/51/D/458/1991. "[T]his means," the Committee explained, "that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances." *Id.*

Specifically, under Article 9 of the Covenant, a state must show that the detention is reasonably necessary. Indeed, "the power of a State to detain must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means." Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection, in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 228 (Erika Feller et al., eds., 2003). All unnecessary detentions, therefore, or detentions of unnecessarily long duration, are inherently arbitrary, regardless of municipal law, and so violate international law.

In addition, Article 9(4) of the Covenant requires that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." The Human Rights Committee has interpreted this provision to require States to provide an independent periodic inquiry into the lawfulness of detention by a court without delay.

The regional human rights agreements are also in accord in condemning arbitrary detention, including the

American Convention on Human Rights – which provides that "[e]very person has the right to personal liberty" and that "[n]o one shall be subject to arbitrary arrest or imprisonment," American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, at ch. II, art. 7[12] – and the European Convention for the Protection of Human Rights and Fundamental Freedoms. E.T.S. No. 5, at art. 5 ("Everyone has the right to liberty and security of person."). The European Convention in particular recognizes the importance of procedural protections in assuring that parties unjustly detained may regain their liberty. It requires the state to provide an opportunity for review before a body independent of the executive. *See id.* at art. 5(4) ("Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful."); *Reid v. United Kingdom*, 37 E.H.R.R. 9, 63 (Eur. Ct. H.R. 2003) (holding that the term "court" as used in art. 5(4) of the European Convention is limited to "bodies which exhibit . . . common fundamental features, of which the most important is independence of the executive"). Moreover, because of the importance of the liberty interest, and because prolonged detention is permissible only in exceptional circumstances, it is the state, not the detained party, that must bear the burden of showing the necessity of the detention. *Id.* at 68–71.[13]

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[12] The United States has signed but not ratified the American Convention.

[13] The African Charter on Human Rights and People's Rights contains the same prohibition against arbitrary detention. OAU Doc.

(Continued on following page)

The lower federal courts of the United States have recognized the prohibition against arbitrary detention under international law. *See, e.g., Alvarez-Machain v. United States*, 331 F.3d 604, 620–21 (9th Cir. 2003) ("[T]here exists a clear and universally recognized norm prohibiting arbitrary arrest and detention."), *cert. granted*, 124 S.Ct. 821 (2003); *de Sanchez v. Blanco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (listing "the right not to be arbitrarily detained" among the small group of "basic rights" that "have been generally accepted"); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.").

The same principles are reflected in the Restatement of Foreign Relations Law, which provides that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention." Restatement (Third) of Foreign Relations Law § 702. A comment to the Restatement explains that the term "arbitrary detention" under international law extends to all detentions that are "'incompatible with the principles of justice or with the dignity of the human person.'" *Id.* at cmt.h (quoting Statement of U.S. Delegation, 13 GAOR, U.N. Doc. A/C.3/SR.863 at 137 (1958)). The Court has repeatedly relied upon the Restatement as an authoritative declaration of the foreign affairs law of the United States. *E.g., C & L Enterprises, Inc. v. Citizen*

CAB/LEG/67/3/Rev. 5, at pt. I, ch. 1, art. 6 ("[N]o one may be arbitrarily arrested or detained.").

Band Potawatomi Indian Tribe, 532 U.S. 411, 421 n.3 (2001); *Weinberger v. Rossi*, 456 U.S. 25, 28 n.5 (1982).

The international norm prohibiting arbitrary detention is also embodied in the municipal laws of the democratic nations of the world. *See, e.g.,* Const. art. 66 (France) (providing that no one shall be arbitrarily detained and charging the judicial authority with ensuring observance of that principle); Cost. art. 13 (Italy) (declaring personal liberty inviolable, forbidding extralegal detention, and requiring that maximum periods for preventive detention be fixed by law). In some states the right is protected by an explicit incorporation into municipal law of international human rights norms. *See, e.g.,* Human Rights Act, 1998, c. 42, § 6(1) (Eng.) ("It is unlawful for a public authority to act in a way that is incompatible with a Convention right [of the European Convention for the Protection of Human Rights and Fundamental Freedoms]."); C.E. art. 10, cl. 2 (Spain) (incorporating into the Constitution of Spain a principle of interpreting rights in conformity with the norms expressed in the Universal Declaration of Human Rights).

In the face of all this, a state's inability to repatriate an alien does not provide a basis for indefinite detention. The United Nations High Commissioner for Refugees has rejected that justification in addressing the detention of stateless persons, those not considered to be nationals of any state. Stateless persons – like nationals of states with which the detaining state lacks a repatriation agreement – are at risk of prolonged detention because there is no nation to which they can be deported. United Nations High Commissioner for Refugees, Guidelines on Applicable Criteria and Standards Relating to the Detention on Asylum-Seekers 2 (Feb. 10, 1999). The Commissioner's

Guidelines make clear, however, that stateless persons are nonetheless "entitled to benefit from the same standards of treatment as those in detention generally." *Id.* at 9. Statelessness "should not lead to indefinite detention" and "cannot be a bar to release." *Id.* Neither, then, may a state justify its indefinite detention of an alien on the ground that the alien's state of origin refuses to accept his return.

The European Convention, too, addresses the rights of immigrants and reaches the same conclusion. It states an exclusive list of exceptions to the principle that "[n]o one shall be deprived of his liberty." European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, at art. 5. With respect to the expulsion of immigrants, it permits only "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." *Id.* It does not allow for the detention of immigrants against whom no action is being taken and who are not able to be deported. *Cf. Quinn v. France*, E.C.H.R. Case No. 47/1993/442/521, 21 E.H.E.E. 529 (Feb. 25, 1995) (holding that detention by France of U.S. national during excessive delays in proceedings to extradite him to Switzerland violated Article 5 of the European Convention).

B. Indefinite Detention Under 8 U.S.C. § 1231(a)(6) Violates the Prohibition Against Arbitrary Detention Under International Law

The prohibition against arbitrary detention under international law forbids states from detaining people unreasonably or for unreasonably long periods. States may

not infringe individual liberties without showing a reasonable necessity for doing so and must provide a meaningful opportunity for independent judicial review for those who believe they have been unjustly detained. Indefinite detention under 8 U.S.C. § 1231(a)(6) is arbitrary and therefore fails to meet the United States' obligations under international law.

The absence of a time limit on the length of detention under § 1231(a)(6), as currently used by the Attorney General, violates the United States' obligations under international law. In *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997), the Human Rights Committee found that Australia's blanket policy of subjecting asylum seekers to indefinite or prolonged detention violated Article 9 of the Covenant on Civil and Political Rights. The petitioner, an asylum seeker, was detained for more than four years while his status was being determined. Australia argued that detention was necessary to prevent asylum seekers from absconding. The Committee rejected Australia's argument stating that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification." *Id.* at ¶ 9.4.

The Federal Court of Australia later reviewed the Australian government's policy of indefinitely detaining aliens unlawfully present within Australia, pending their removal, even when removal was not practically possible. *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri,* 126 F.C.R. 54 (Fed. Ct. Austrl. 2003) (application for special leave to appeal to the High Court

refused, Aug. 14, 2003). Relying in part on *A v. Australia*, the court held that, under the government's construction, the statute would violate Australia's obligations under the Covenant on Civil and Political Rights. *Al Masri*, 126 F.C.R. at ¶¶ 147, 155. It therefore read the statute as containing "an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention." *Id.* at ¶ 155. The court also relied in part on *Zadvydas* in holding that statutes should be construed so as not to violate fundamental rights, absent clear legislative intent to the contrary. *Id.* at ¶¶ 110-14.

The United Nations Working Group on Arbitrary Detention, which the United Nations created to investigate violations of Article 9 of the Covenant on Civil and Political Rights and other cases of detention that violate international law, reached a similar conclusion. In its consideration of the detention of immigrants, it stated that a "maximum period [of detention] should be set by law and the custody may in no case be unlimited or of excessive length." *See* Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2000/4, at principle 7 (Dec. 28, 1999); *accord* Report on the Visit of the Working Group to the United Kingdom on the Issue of Immigrants and Asylum Seekers, U.N. Doc. E/CN.4/1999/63/Add.3 (Dec. 18, 1998); *see also Ferrer-Mazorra v. United States*, Inter-American Commission on Human Rights, Rep. No. 51/01, Case 9903, at ¶ 177 (Apr. 4, 2001) ("[S]tates have historically been afforded considerable discretion under international law to control the entry of aliens into their territory. This does not mean, however, that this discretion need not

be exercised in conformity with states' international human rights obligations.")

Indeed, the Working Group on Arbitrary Detention addressed the issue of arbitrary detention of immigrants by the United States in one case, and condemned the practice as a violation of Article 9 of the Covenant on Civil and Political Rights. *See* Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Report of the Working Group on Arbitrary Detention, Addendum, Decisions and Opinions Adopted by the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998.44.Add.1 (Nov. 3, 1998) (considering allegations, unchallenged by the United States, of three Cuban nationals who claimed to have been detained by the United States because of their nationality).

Section 1231(a)(6) also fails to provide the detainee with meaningful judicial review of the lawfulness of detention and therefore violates U.S. obligations under international law. In ensuring compliance with Article 9(4), the Human Rights Committee has consistently held that detainees must have periodic access to a court with the power to decide upon the legality of the detention. In *Torres v. Finland*, Communication No. 291/88 (Apr. 2 1990), the Human Rights Committee found that review of the lawfulness of detention by a Ministry official failed to meet Finland's obligations under Article 9(4). In reaching its finding, the Committee emphasized that Article 9(4) required review by a court "so as to ensure a higher degree of objectivity and independence." *Id.* at ¶ 7.2. In the case of *A v. Australia*, the Committee stressed that court review "must include the possibility of ordering release." *Id.* at ¶ 9.5.

Here, an inadmissible alien has no access to a court that can review the lawfulness of the detention. An inadmissible alien is entitled only to a limited review by an official, in which the alien bears the burden of proof. *See* 8 C.F.R. § 241.4(d)(1) (2003) (permitting release "if the alien demonstrates to the satisfaction of the Attorney General" that he does not pose a danger to the community or a risk of flight). Moreover, this Court found in *Zadvydas* that special procedural protections are required in all cases of preventive detention on the basis of dangerousness and noted the "obvious" constitutional problem raised by such a lack of procedural protections where a permanent deprivation of liberty may be at stake. *Zadvydas*, 533 U.S. at 691-92. As discussed above, adequate procedural protections are required under international law as well. The prohibition against arbitrary detention applies, in particular, to the continued detention of convicted criminals who have already served the whole of their prison terms. Section 1231(a)(6) provides for the deprivation of liberty after a final order of removal has been granted; the detainee is not awaiting criminal trial or detained as punishment for a crime. The Human Rights Committee has addressed this practice and held that it violates Article 9 of the Covenant on Civil and Political Rights. *Nqalula Mpandanjila v. Zaire,* Communication No. 138/1983 (Mar. 26, 1986), U.N. Doc. Supp. No. 40 (A/41/40) at 121 (1986).

Finally, states are prohibited from infringing the right to liberty without showing reasonable necessity, which the government has not done in this case. The circumstances of Benitez's detention demonstrate this. Benitez is not serving a criminal sentence, and no criminal proceedings are pending against him. Although Benitez is a convicted criminal, he has completed his sentence. Without an

independent court proceeding, any argument by the government that Benitez poses an intolerably high risk of danger to the community cannot be substantiated.[14] Indeed, detention under § 1231(a)(6) is not limited to a class of unusually dangerous people. Rather, it is available for the whole range of aliens who are inadmissible under 8 U.S.C. § 1182 or removable under § 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4), or whom the Attorney General believes unlikely to comply with an order of removal. *See* § 1231(a)(6). As the Human Rights Committee stressed in *A v. Australia*, the broad application, under § 1231(a)(6), of indefinite or prolonged detention violates the international law standard forbidding states to infringe liberty interests absent a showing of necessity.

Under § 1231(a)(6), the government holds immigrants indefinitely, even where they are not serving a criminal sentence, are not awaiting criminal prosecution, do not present a flight risk, and have not been shown to be a danger to the community. These immigrants are unable to obtain judicial review of the detention orders that threaten to deprive them permanently of liberty. Such detention is therefore arbitrary and a violation of international law.

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[14] Neither can the government justify indefinitely detaining Benitez on the basis that he presents a substantial flight risk; as this Court has noted, the risk of flight "is weak or nonexistent where removal seems a remote possibility at best." *Zadvydas*, 533 U.S. at 690.

C. The "Entry Fiction" Provides No Basis for the Violation of Basic Human Rights

The so-called "entry fiction" – the fiction that an inadmissible alien, who in this instance resided in the country for 20 years has never entered the territory of the United States – provides no justification for arbitrary detention. Simply put, international law does not recognize the distinction that U.S. immigration law draws among removable immigrants – the distinction between those who are "deportable" because they have "entered" the United States, *see* 8 U.S.C. § 1227(a), and those who are "inadmissible," *see id.* 8 U.S.C. § 1101(13)(B) & 1182(d)(5).

As Justice Kennedy noted in *Zadvydas*, "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary and capricious." 533 U.S. at 721 (Kennedy, J., dissenting). The international law standards are the same for both groups. *See id.* (citing Report of the United Nations Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999); United Nations High Commissioner for Refugees, Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers (Feb. 10, 1999)). As discussed above, international law asks simply whether a state's detention of an individual is reasonably necessary to accomplish a legitimate purpose, considering all the circumstances. If not, then continued detention is arbitrary and therefore illegal.

It would, indeed, be surprising if international law *did* recognize the distinction between deportable and inadmissible immigrants. While the distinction "runs throughout immigration law," *Zadvydas*, 533 U.S. at 693, it is relevant

only as to the procedures necessary to exclude unwelcome immigrants: the inadmissible may be prevented from entering, while the deportable must be ejected. *Id.* at 703-04 (Scalia, J., dissenting). As to substantive liberty interests, the categories have no meaning. Congress apparently recognized as much when it passed the statutory provision at issue, which itself treats the two categories identically as to detention while awaiting removal. *See* § 1231(a)(6). The two categories, furthermore, do not differ with respect to the factors that may justify prolonged detention in exceptional circumstances. The inadmissible are not, for example, more dangerous than the deportable, or more likely to avoid appearing for future proceedings. They are surely no less human and no less deserving of human rights.

The distinction between inadmissibility and deportability is particularly insubstantial in the case of immigrants, such as Benitez, who have resided in the United States for many years. Inadmissible immigrants include not only parolees, but also, in many cases, permanent legal residents of the United States who left the country, even for a short time, and were then deemed inadmissible when they attempted to return. *See* 8 U.S.C. § 1101(13)(C) (stating conditions under which legal permanent residents attempting to reenter are "seeking admission" to the United States). Many inadmissible immigrants, including Benitez, came to the United States to escape from the oppression of their home states and were welcomed by the government when they arrived. Years later, after having encouraged them to make a life for themselves here, the government may not forfeit their most basic human rights by simply labeling them "inadmissible."

CONCLUSION

Amici urge the Court to read 8 U.S.C. § 1231(a)(6) as limiting an inadmissible alien's detention to a time reasonably necessary to secure his removal, just as the Court held with respect to the detention of deportable aliens under the statute. *Zadvydas*, 533 U.S. at 696-99. In *Zadvydas* the Court held, correctly, that the statutory language of § 1231(a)(6) is ambiguous – that Congress did not express a clear "intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed." *Id.* at 697. The language of the provision does not distinguish inadmissible aliens from deportable aliens. *See* § 1231(a)(6). If the statute is ambiguous with regard to one class of unwelcome aliens, it is ambiguous with regard to both classes. *See Zadvydas*, 533 U.S. at 710-11 (Kennedy, J., dissenting). Statutes should not be interpreted in a manner that places them in conflict with international law unless no other reading is possible. *The Schooner Charming Betsy*, 6 U.S. at 118. To avoid such a conflict, the Court should hold that the implicit reasonableness limitation on the length of detention under § 1231(a)(6) applies to inadmissible, as well as to deportable, immigrants.

For all the above-stated reasons, the Court should reverse the decision of the court below.

Respectfully submitted,

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